No. 14-915

IN THE

Supreme Court of the United States

REBECCA FRIEDRICHS; SCOTT WILFORD; JELENA FIGUEROA; GEORGE W WHITE, JR.; KEVIN ROUGHTON; PEGGY SEARCY; JOSE MANSO; HARLAN ELRICH; KAREN CUEN; IRENE ZAVALA; and CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL,
Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF FOR THE ATTORNEY GENERAL OF CALIFORNIA IN OPPOSITION

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ARGUMENT

I. The California Attorney General's Brief In Opposition Confirms The Need For This Court To Reconsider *Abood*.

A. Echoing the dissent in *Harris v. Quinn*, the California Attorney General's primary defense of *Abood* is that "negotiations addressing routine employment matters ... are not 'political' in that sense." Cal.AG.Opp.7. That directly contradicts Respondent Unions, who rightly recognized that public-sector collective bargaining is a political process involving matters of public concern. *See* Union.Opp.21 (public-sector collective bargaining's "'political elements'" are not a "late-blooming revelation that the *Abood* Court failed to take into account"). The fact that California's Attorney General disagrees with the Respondent Unions on the nature of the speech infringed in this context confirms the confusion and incoherence underlying the *Abood* regime. That confusion is alone sufficient reason for the Court to grant review to reconsider *Abood*.

Worse still, the California Attorney General's characterization of the speech in *Abood* conflicts with *Abood* itself. *See* Pet.14-17. The *Abood* majority recognized "the truism that because public employee unions attempt to influence governmental policymaking, their activities—and the views of members who disagree with them—may be properly termed political." *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 231 (1977). The California Attorney General thus abandons *Abood*'s rationale in order to justify its result. And by thereby conceding that *Abood* was not "well reasoned," *Montejo v. Louisiana*, 556

U.S. 778, 792-93 (2009), the California Attorney General confirms the need to reconsider it.

Indeed, the fact section of the Attorney General's Brief in Opposition vividly illustrates that public-sector collective-bargaining speech is quintessentially "political." California law "prescribes certain procedures for public participation in the collective bargaining process." Cal.AG.Opp.3. It mandates such citizen participation precisely "to ensure that [the] public is 'informed of the issues that are being negotiated upon and have a full opportunity to express their views on the issues to the public school employer, and to know of the positions of their elected representatives.'" *Id.* (quoting Cal. Gov't Code § 3547(e)). Thus, these provisions expressly recognize the political importance of public-sector collective bargaining. They also demonstrate the fundamental difference between bargaining with the government and bargaining with private employers. Ford Motor Company does not invite the public to comment on its collective-bargaining agreements because those are *private* contracts resolving *private* issues; California requires that school districts permit public comment on their collective-bargaining agreements because the bargained-over issues are *political* issues of *public* concern. These statutes thus make clear that—whatever California's Attorney General may argue in opposing certiorari—California's legislature recognizes that public-sector collective bargaining involves "matter[s] of great public concern." *Harris v. Quinn*, 134 S. Ct. 2618, 2643 (2014).

B. The California Attorney General also claims that reconsidering *Abood* would "disrupt[] ...

longstanding, complex, and sensible statutory and contractual arrangements." Cal.AG.Opp.9-10. That is both irrelevant and wrong. It is irrelevant because if "a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any [] 'entitlement' to its persistence." *Arizona v. Gant*, 556 U.S. 332, 349 (2009); *see* Pet.27-28. And it is wrong because eliminating Respondent Unions' ability to prospectively exact tribute from Petitioners would not undermine any collective-bargaining agreements in any way. *See* Pet.32-33. All current agreements would remain in force until they expire, at which point Respondent Unions would be free to negotiate new agreements (supported by the voluntary dues of those who support such efforts).

C. Finally, the California Attorney General parrots Respondent Unions' insistence that the Court should not reconsider *Abood*'s categorical rule in a case squarely challenging that rule. According to the California Attorney General, this Court should await a petition that follows a full-blown trial resolving wide-ranging factual issues that are all immaterial under currently binding precedent. Neither Respondent has suggested, however, *how* a dissenting teacher is supposed to persuade a district court to waste valuable time and resources resolving factual issues that all agree are immaterial under current law. Nor has either Respondent explained *why* it makes sense for the parties to spend years litigating such irrelevancies. Nor could they, since this case—in which the district court entered judgment on the pleadings against Petitioners—comes in the ideal posture to reconsider *Abood*'s categorical rule.

1. All parties and both courts below agree that Petitioners' Complaint fails to state a claim under *Abood*. Respondent Unions emphatically took that position in the district court, Pet.App.145a ("controlling precedent[] *require* denial of the relief Plaintiffs seek"), which is why they acknowledged that the only permissible disposition of the Complaint was judgment on the pleadings. Petitioners thus come to this Court asking it to consider whether their allegations—if true—establish a constitutional cause of action. Should this Court, in modifying *Abood*, adopt a legal rule under which it matters whether certain allegations are true, the parties will litigate those disputes on remand, just like every other party who leaves this Court to pursue claims on an altered legal landscape.

The entire purpose of Motions to Dismiss and Motions for Judgment on the Pleadings is, after all, to facilitate efficient review of legal questions. These tools exist to avoid the unnecessary cost of resolving factual fights that have no legal consequence. The district court recognized that below, taking the Complaint's allegations as true, noting that the "parties [did] not dispute that *Abood* and *Mitchell* foreclose Plaintiffs' claims," and holding "that these decisions are controlling." Pet.App.8a. It is now for this Court to decide whether those "controlling" decisions remain good law. [1]

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[1] The California Attorney General joins Respondent Unions in arguing that this Court must assume the allegations of the prevailing party (the Unions) are true. Cal.AG.Opp.11; Union.Opp.25 n.16. That is wrong, as the lone decision both Respondents cite makes clear. *See Hal Roach Studios, Inc. v.*

Indeed, the only reason Petitioners were forced to file a Motion for Judgment on the Pleadings themselves is that Respondents sought to waste the parties' (and the district court's) time litigating disputes they agree make no difference under current law. That strategy was transparently designed to prolong this litigation and forestall this Court's review—delay that works entirely in Respondents' favor since each month that passes without this Court's review, Respondents collect millions of dollars from dissenting teachers across the nation and spend those dollars on their political objectives.

The Court should not reward such tactics. The obligation of lower federal courts to scrupulously follow this Court's decisions "which directly control[]," *Agostini v. Felton*, 521 U.S. 203, 237 (1997), obviously does not foreclose this Court's eventual review of those directly controlling decisions.[2]

(continued...)

Richard Feiner & Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1989) (judgment on pleadings is proper where "no material issue of fact remains to be resolved" and prevailing party "is entitled to judgment as a matter of law"). It is hornbook law that in appeals from judgment on the pleadings—just like appeals from 12(b)(6) dismissals—the reviewing court takes the losing party's allegations as true. *See, e.g., Hart v. Hodges*, 587 F.3d 1288, 1290 n.1 (11th Cir. 2009); *Roger Miller Music, Inc. v. Sony/ATV Publishing, LLC*, 477 F.3d 383, 389 (6th Cir. 2007).

[2] Petitioners have not "concede[d] that some compulsory contributions—those assessed to support union representation in the grievance-adjustment process—pose no constitutional concern." Cal.AG.Opp.12 n.2. What Petitioners *actually* argued is that even if this Court concludes compelled payments for limited activities (such as grievance representation) are

II. The California Attorney General's Brief In Opposition Likewise Confirms The Need For This Court To Review Respondents' "Opt-Out" Regime.

The only substantive argument California's Attorney General makes against reviewing the second Question Presented is its assertion that "Petitioners' claim [ ] does not implicate any conflict on the narrower question of annual renewal." Cal.AG.Opp.13. That is plainly wrong. While Petitioners believe *any* opt-out requirement is unconstitutional—and that the risk of error-through-inertia should fall on "the side whose constitutional rights are not at stake," *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2295 (2012)—that Question includes the subsidiary issue of whether Respondent Unions can lawfully require Petitioners to renew their objections *every year*. Respondent Unions made clear below that they insist on annual renewal. *See* Pet.App.154a ("Even if a nonmember were to declare that his or her objection should be considered to be permanent or continuing, which none of the individual Plaintiffs has done, there still would not be sufficient grounds to assume, in any and every subsequent year, that the individu-

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(continued...)

permitted, Respondents cannot bootstrap those narrow issues into justifying large, unrelated fees that fund inherently political speech in the collective-bargaining process. *See* Reply.Union.Opp.5-7. As they have from the outset, Petitioners contend that compelling them to provide money to unions to subsidize activities that are overwhelmingly (and often exclusively) devoted to controversial advocacy is impermissibly overbroad under basic First Amendment principles.

al continues to wish to opt out."). And there is a square circuit split on that issue. *See* Pet.35-36. For that reason alone, the second Question Presented is amply worthy of this Court's review.

The remainder of the California Attorney General's Brief in Opposition merely reiterates the arguments set forth in the Respondent Unions' Brief In Opposition, all of which were thoroughly refuted in Petitioners' Reply to that Opposition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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